OUR COMPULSORY ARBITRATION TREATIES SHOULD BE AMENDED

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As a preface to the statements I am about to make, I must state that I am strongly opposed to the United States of America becoming a party to a League for the Maintenance of Peace or any other form of permanent international alliance. The counsel of Washington is in my opinion as wise today as it was in 1796, and it still is

> our true policy to steer clear of permanent alliances with any portion of the foreign world. . . . . Taking care always to keep ourselves by suitable establishments on a respectable defensive posture, we can safely trust to temporary alliances for extraordinary emergencies.

During more than a thousand years, many experiments have been attempted at securing a continued peace in the world by means of compacts, alliances and treaties. All have failed to gain more than temporary breathing spells in the long history of human strife. Conflicting or coincident interests and ambitions are more powerful than written stipulations. The century of peace with Great Britain which we celebrated a short time ago was the result of no peace compact, but the product of common traditions, like moral standards and similar interests. Even the Constitution of the United States, the most perfect example of a "League for the Maintenance of a Just and Durable Peace," was ineffectual, despite identity of tradition and language, to prevent one of the bloodiest wars in history among the states composing the Union, and a durable peace was secured only by removing the institution of slavery whose continued existence created an irrepressible conflict stronger than any written compact.

There is a positive danger to our essential national interests in looking to others to secure for us those conditions which strong nations should themselves obtain and keep. The period of frantic effort to put away all sense of responsibility to prepare our nation to defend its vital interests by force of arms, through which we have passed in the last few years, among other ways found expression in the making of a large number of ill-considered international agreements which, now that our national eyes are reopened to actualities,

machinery of the law, although wonderful and complex, is only to make a definite product for the clients.

The clients' witnesses need to be considered as justice depends upon ascertaining facts, and their testimony should be elicited in the smoothest, gentlest and most thankful manner. If necessary a taxi should be sent for the witnesses. Their time and convenience should be consulted. The court asks their help and it is only reasonable to treat them with courtesy. When day labor is paid at $3 why should witnesses receive only fifty cents? The least that could be done is that the court will be responsive to their kindness. If witnesses are regarded as partisans for one side or the other in a great legal battle, the present system is advisable, and each side will continue to pay the witness outside the court.

Then the case would be turned over to the pleading or issue experts, corresponding to the English pronotary. In any large business corporation, daily problems and conditions have to be met and the first proceeding is to arrive at the exact question to be decided. It is hard to find a more absurd method of discovering the limits of a problem than by the common law or modern pleading. One side or the other often insists, because they believe they may have a possible chance of winning on a fluke or a misplay. If the matter were thoroughly sifted and defined by the judge or some judicial pleading officer or Master under him, the issues when they finally came to be tried would be clear cut. The actual time of the trial would be shortened. This forming of issues should be distinctly a court proceeding. Theoretically it is so now; the lawyer in issuing summons or drawing and serving the pleadings often acts as an officer of the court, which by the clerk sets the stamp of approval on his acts. Yet actually they are not court proceedings, but are merely phases of a legal game.

In the courts of the future, there will be no written pleadings; so far as the clients go all that should be necessary is to write a letter or send to the other side a bill. The real pleading will be arranged by the courts; judicial officers will investigate the facts and frame the issues. The object of the present-day pleading seems to be to tell as little about the case as possible. Framed in technical language their aim is only to make out a "cause of action," which will give them a standing in court without stating enough to give away their case to the other side. In other words, pleadings are

often cloaks or suits of armor which disguise the real issue, or like the matador's red cloak, serve to infuriate the opposing bull. It is shown by the frequent refusal to give any further information, and the appeals from orders for bills of particulars, or orders to make more definite and certain, or from demurrers. It seems necesary for the present-day lawyer to deal in wary words and forms that are over grave.

Suppose that the function of the lawyer in this respect were taken over by the court, the pleadings would have two objects: one to apprise the other side as to what the facts were in dispute, and secondly, to frame the issues clearly before the tribunal. At present the first object is not usually accomplished. It is easier to answer by denying all, and it is a better policy to do so. A trial would seem to be a free-for-all fight. The skilled lawyer says it is as easy to fight about all matters as about one or two particular matters, and if the plaintiff be compelled to prove a great deal, he may become so exhausted when he reaches an essential issue, he will fail. If, however, the court assumes the direction of pleading as it practically does in some courts of the country, there would be less danger of surprise. The court could practically say: "Now on this issue are you seriously going to dispute the fact? As a reasonable man, are you denying it?" If he answers "Perhaps it is so, but, let the other side prove it," it ought to be possible for the court to throw his technical objections out of the window.

Again if the definition of issues were distinctly a court rather than a partisan proceeding there would not be so much floundering about before trial. In modern legislative bodies there is usually a bill-drafting department where legislation may be put in legal and technical form. So in courts should there be Masters or at least trained clerks whose duties would be to frame issues.

The preparation would proceed not in the usual haphazard way. The evidence would not be procured or produced in court according to the financial ability of the client. If it be once admitted that the public should bear the expense of private suits, it is reasonable that the public should also assume all costs for a final determination in the best possible manner. If the court really wants the truth, let it be obtained by a trained corps of investigators.

The judge occupies a position so high that he is supposed to be virtuous and elevated to the last degree, so that the temptation is for him to become inhuman or non-human. Often because he has

a larger perspective and a wholesome contempt for the procedure, he obtains a truer point of view. Although he does not accept his position in a spirit of resignation, yet he makes the best of the formalism of court procedure.

His position would be more reasonable if the courts were reconstituted, as "justice factories." He would not find himself as the representative head of a business for which he is apparently though not actually responsible.

With the jury to decide the law in the case, and the judge to determine the facts there might also be justice. The laws being only crystallized common sense it might be that no one would be better able to enforce them than twelve average men. The present function of the jury to determine facts through testimony is hardly the best method. First, they are not accustomed to ascertaining facts. They have not heard a great quantity of witnesses, and they are not experts in perjury. Secondly, they are not accustomed to weighing one bit of evidence against the other. Their minds have not been trained either to remember all the evidence or for a logical discrimination as to its importance. They are apt to assume some parts as of undue importance and others as having little bearing.

Were the judge to ascertain the facts, at least there would be an expert. Technically the prisoner might be guilty of a crime. The judge would find all the facts, but the jury would take into account the extenuating circumstances, the prisoner's youth, the possibility that his life might be ruined by imprisonment, and would pronounce sentence accordingly. Practically that is what happens. In an accident case the jury takes into account the plaintiff's lawyer's bill, if they award any damages. Most verdicts are rendered in modern courts on this line. The jury has sworn to weigh the evidence and only decide according to the law as laid down by the judge. They usually apply the law of common sense and decide the facts according to the judgment that they know will be rendered.

The imaginative genius who will formulate a system of courts and of court procedure to meet modern conditions will answer one of the grave questions of the age. The superman, realizing the inadequacy of the survival of an ancient ordeal by battle as a means of arriving at truth, will devise a machinery and organization that will change the courts into places of impartial investigation.

With the judge and the court freed from technicalities, they

may engage detectives, investigators, official experts or use any means available to determine facts or law. They would then no longer present the picture of quiet spectators at a contest when they should be the active means of a judicial investigation. Is this Utopia? Then would I be a citizen thereof.

and controversies arising among the sister republics of Central America. Costa Rica and Salvador separately presented to that court their respective objections to the treaty and the facts upon which each claimed that Nicaragua had no right without its consent to undertake to grant to the United States the rights sought to be conferred by the treaty. Nicaragua, under the influence of the United States, and it appears to be undisputed, at the suggestion of the state department, ignored the order of the Central American Court of Justice calling upon it to answer the claim of Costa Rica, and refused to submit its right to make the concessions to the court, although the convention creating the court provided for the submission to it, without restriction, of all controversies or questions that may arise between the contracting parties whatever their nature and whatever their origin. The court thereupon proceeded *ex parte* to examine the claims of Costa Rica, and on September 30, 1916, it rendered a solemn judgment reviewing the facts and finding that Nicaragua was without right or power against the objection of Costa Rica to enter into the Bryan-Chamorro treaty with the United States. Nicaragua promptly notified Costa Rica that it would not respect or abide by the decision. On October 30, 1916, Costa Rica officially advised the United States of the decision and the attitude assumed by Nicaragua, but up to the present time the United States has taken no steps to uphold the action of the court which was her own creation.

It is true that the United States was not technically a party to that proceeding, but morally she was, and as the great sponsor of the principle of the universal arbitration of international disputes, it certainly ill became her to encourage Nicaragua to disregard the summons to inquiry by or to flout the decision of the tribunal which the United States had procured to be organized for the very purpose of passing upon such questions. The award of the Central American Court of Justice so made will certainly be followed by a claim against the United States by Costa Rica under the Hague Convention, or otherwise, calling for submission to the Hague Tribunal, or some other court, of the question whether or not by entering into the convention with Nicaragua above referred to, the United States had not invaded the rights of Costa Rica and Salvador and sought to acquire something without the consent of those nations which could only properly be granted with that consent. It is difficult to

see how the United States could refuse to arbitrate that question and she will enter upon the controversy handicapped by the attitude of urging upon a small nation a treaty concession claimed to invade the sovereign rights of another small nation, and preventing the submission of the question to inquiry or arbitration before a court of her own creation. The lesson of this incident should be greater caution against indiscriminate treaty making for sentimental purposes.

But even more serious is the effect upon the principle of international arbitration of the attitude of the United States government towards the great Central American tribunal she called into existence in 1907. Not only did the United States encourage Nicaragua to enter into treaty relations with her in disregard of the rights of her neighbors, but her course has necessarily discredited the tribunal she helped to create for the purpose of settling just such disputes as she created when she entered into the treaty with Nicaragua.

The effect of treaties of the Bryan type upon the national policy of the United States known as the Monroe Doctrine is a matter for serious consideration. Beyond any question, after the war is over, Germany will seek expansion for her commerce in the western hemisphere. Germany's method in the past has been to conduct her commercial expansion wholly under governmental agencies. The expansion of German trade in South America means the establishment by Germany of coaling stations and naval bases and the acquisition of political control over portions of South and Central America. It is well understood that the purchase by the United States of the Island of St. Thomas was for the purpose of preventing it from falling into the hands of Germany. But suppose that after the war Germany should purchase from Holland the territory of Dutch Guiana, and information of the acquisition should come to us only after the purchase was completed. We should, unless we completely depart from our traditional policy, regard that as an invasion of our rights under the Monroe Doctrine and challenge the acquisition. True, we have no Bryan treaty with Germany, nor, it chances, with Holland, and in that particular instance, therefore, we should not be embarrassed by the stipulations of such a compact. But suppose Germany undertook to purchase from Ecuador or Bolivia, with each of whom we have Bryan treaties, would we stop and submit to a commission for investigation and report the

right of either of those countries to cede territory to Germany, and in the meantime allow German officials to establish themselves in the acquired territory? Such a course would be absurd. Abstractly, each of those countries has a right to do what it wills with its own. But as a national policy for the protection of our national interests we have declared that we should view as a deliberately unfriendly act the effort of any European nation to extend its governmental system to this hemisphere. We may maintain that position if we will. No other nation can settle for us the question whether or not we shall do so.

The fact is that during the period of what Rudyard Kipling so well calls our "drugged and doubting years," a widespread theory prevailed that all international strife in the future could be avoided by entering into compacts with foreign nations agreeing to arbitrate or refer to commissions for report all questions at difference. But nations after all are but aggregations of individuals; and the experience of individuals demonstrates the fact that the best drawn contracts imaginable do not always prevent litigation, and the principal value of compacts between nations as in the case of individuals is to afford, first, a definition of their respective interests and claims towards each other; and second, a moral barrier against hasty and unconsidered hostilities. No contracts or treaties, however well devised, have ever proved effective against the strong sentiment of a nation. Wise and prudent statesmanship should prevent a nation from entering into obligations which it can readily be foreseen would prove an embarrassment in time of stress and probably would not, possibly could not, be observed, except in cases where it would be as easy to negotiate a convention applicable to the particular circumstances as to rely upon a general convention whose terms might be broad enough to provide for the particular exigency.

In the general readjustment and reconsideration of affairs incident to our war with Germany, it would be well for the Senate to take up these Bryan peace treaties and negotiate modifications of them to make them accord with the unbroken American policy of a century and with our sound national principles, so that we shall not be confronted with embrassments of our own making in cases where our national interests require prompt and not dilatory action.